in my opinion, that the "emotional feelings" required are of a special type, that is to say, they are such feelings as may ordinarily be expected to spring from the fact of the "near relation." If either the feelings or the relation are lacking, the section does not apply. In this case I think both were lacking. There is no express evidence that any love or affection existed in fact between the parties in this case and there are no circumstances from which one is obliged, or even entitled, to infer it. The abandonment by the legal next-of-kin of their claims in favour of persons who may have had a better moral right to inherit points only to a sense of duty, not necessarily to any love or affection. If love and affection were stated in the document to exist, an estoppel might in certain circumstances arise. In the case of parent and child there is, no doubt, a strong presumption that love and affection exist. Indeed, in that case, the presumption may be sufficiently strong to afford proof, within the meaning of the Evidence Ordinance, without any actual evidence. But if the relation is less near, the presumption diminishes with the nearness, and rapidly becomes too weak to act upon, in the absence of express evidence. If the evidence of love and affection were strong, I personally should wish to take a liberal view on the question what type of relation could in law be near, and I think it not impossible that, (apart from any differences arising from different personal laws) the answer to that question might be affected by the circumstances of the individual case. For example, if an orphan were brought up by comparatively remote relations, who were nevertheless his nearest, I think the Court might hold them to be "near" in the special circumstances, though ordinarily they would not be "near." I am disposed, therefore, to think that there may be a sort of sliding scale by which love and affection, proved or presumed, and relative nearness of relation may interact on one another, and that, although some relations are obviously near, it would be unwise to say generally that any specific relation must be too remote. In this case, however, I am satisfied that no special circumstances exist which might weigh in favour of nearness, and hold that the relation was too remote on the grounds which the learned President has given. It must be remembered that the document on its face is void for want of consideration. The onus of showing that there was consideration, or that circumstances existed which rendered consideration unnecessary, was on the parties seeking to establish the document's validity. They have failed to do so. I hold that the document is not a contract.

I agree that the appeal should be dismissed, and I agree with the order proposed by the learned President on the question of costs, both here and below. The distinction between a stranger to an estate, claiming adversely to the apparent beneficiaries and instituting proceedings for the purpose, and a similar claimant brought in as a respondent in domestic proceedings by the administrator, is one of substance, not merely of form. The adopted children and Tan Boey Kee should not have been deprived of their costs in the Court below. The position might have been different if there had been an order for trial of an issue.

Appeal dismissed.

PUBLIC PROSECUTOR
v.
LOOI YEW CHUN AND TWO OTHERS

[App. Crim. Juris. (Thomson, J.) February 22, 1951]

[Ipoh — Criminal Appeal No. 8 of 1951]

Customs Enactment, s. 144(i)(h) — Fraudulent evasion of customs duty — Burden of proof on the prosecution — Conviction by the High Court under different section.

In this case the three accused were all charged under section 114(i)(h) of the Customs Enactment for being knowingly concerned in a fraudulent attempt at evasion of Customs Import Duty amounting to $124.12. The evidence for the prosecution was that the first defendant as the accredited agent of Lai Wah & Co., Ipoh, on 26th May, 1950, made an application to the Customs Office, Ipoh, to import a case of textiles and declared the cost at $1.85 per yard. He also produced in support of the application an invoice in Chinese from Lee Say & Co., Singapore which mentioned the price of the cloth as $1.85 per yard. The Customs Officer doubted the value declared by the importer and referred the matter to the Technical Adviser on Piece Goods, Federation of Malaya who assessed the cloth at $3.15 per yard. The prosecution also disclosed that the same case together with two others were ordered by the second defendant on behalf of Lai Wah & Co. in December 1949 from the firm of 'Societa' Singapore. An agreement for the said order was signed by the second defendant and the firm's agent at Kuala Lumpur. According to the agreement the cases were to be delivered at Singapore Railway Station and the cost was $3.70 per yard. The goods arrived from Italy round about March 1950. Some time before the arrival of the goods the second defendant directed the 'Societa' agent to deliver them to Lee Say & Co. on arrival, that is, in March 1950 and were paid for by the defendant firm (Lai Wah & Co.) about two months later. The prosecution also disclosed that Lee Say & Co., Singapore, were shareholders of Lai Wah & Co., Ipoh and also directors of the latter company.

The first defendant said in his defence that he was handed the invoice by the second defendant on 26th May, 1950, and asked to take delivery of the goods. He did as instructed. He did not know about the contract nor if the value stated in the invoice was false or not. There was no evidence against the first defendant that he was privy to the attempt at evasion of the customs duty, and the learned Magistrate acquitted him.

The third defendant said he was the buying agent for Lai Wah & Co. He went to Singapore on 22nd May, 1950, and bought ten pieces of 'palm beach' at $1.85 per yard from Lee Say & Co. He paid cash. He also stated that he merely saw the samples of the cloth and thought they were cheap at $1.85 per yard. He did not see the case of cloth in Singapore. He returned to Ipoh and handed the invoice to the second defendant who was managing director. He did not bring back any samples with him to Ipoh but only the invoice. The learned Magistrate held that there was no evidence that the third defendant knew anything about the order from 'Societa' and that there was no evidence that he knew anything about the history of the goods at all, and as the prosecution proved no guilty knowledge, he acquitted him.

The story of the second defendant, the managing director of Lai Wah & Co. was that he did order in December 1949 three cases of textiles from 'Societa' through its agent. He did so, he stated, on behalf of Lee Say & Co. who wanted such goods and he directed that they be delivered to Lee Say & Co., Singapore. What happened to them after the delivery to Lee Say & Co. he did not know except that he paid for the goods using his own cheque as Lai Wah & Co. had not sufficient fund. He was also acquitted.

The learned Magistrate held that the prosecution must show that either the invoice is false by discovery and production of another invoice or that the seller is called to say that he sold at a different price and was asked by the defendants to put up an invoice stating a lower price. In this case neither had been proved, he further held. From this decision the Public Prosecutor appealed.

Held, (1) that although there was a considerable amount of evidence in this case that went to show that a system of fraudulent evasion of customs duty was in fact being practised, before any of the respondents could be convicted of an offence under section 114(i)(h) of the Customs Enactment in relation to it it had to be proved, and proved according to the ordinary standards of proof in criminal cases, that he was concerned in the evasion and that he was knowingly concerned; and (2) that in this case the proper view was that the onus of proof lay all along upon the prosecution: there was never and could never be at any time any question of a technical shifting of the onus of proof and the evidential value to be attached to any invoice or any other piece of evidence was entirely a matter for the consideration of the Court of trial in the light of the circumstances of the individual case as a whole.

Case referred to:—

(1) *Wong Ngian Thin v. Public Prosecutor* (1940) F.M.S.L.R. 283.

APPEAL from the Magistrate's Court, Ipoh.

B. J. Jennings (D.P.P.) for the appellant.

K. C. Chan for the respondents.

Cur. Adv. Vult.

Thomson, J. : —This is an appeal by the Public Prosecutor against a decision of the Magistrate at Ipoh. The three respondents were prosecuted on a charge under section 114(i)(h) of the Customs Enactment which says that whoever "is in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any Customs duty" is guilty of an offence.

On that charge the Magistrate found the respondents not guilty and acquitted them and against that order of acquittal the Public Prosecutor has now appealed.

The alleged fraudulent evasion of customs duty was in respect of a quantity of cloth imported from Singapore by a firm with which each of the respondents is in one way or another connected. In brief, it was alleged that the method of the fraud was that the goods were bought in Singapore by what I may describe as a "guinea pig" firm which in its turn purported to sell them and invoiced them to the Ipoh firm at a value considerably less than, and in this case about half of, their value. There is a considerable amount of evidence that goes to show that such a system of fraudulent evasion of customs duty was in fact being practised, but before any of the respondents could be convicted of an offence under section 114(i)(h) in relation to it it had to be proved, and proved according to the ordinary standards of proof in criminal cases, that he was concerned in the evasion and that he was knowingly concerned. As I have said, that had to be proved according to the ordinary standards of proof in criminal matters and neither section 124 nor any of the other sections of the Customs Enactment which provide the reversal of the onus of proof in regard to certain matters had any application. I am confirmed in that view by a consideration of the judgment of Mr. Justice Cussen in the case of *Wong Ngian Thin v. Public Prosecutor*[1] which related also to an offence under section 114 of the Customs Enactment. In the course of his judgment His Lordship considered the terms of section 124 and observed :—

"Here, in my opinion, the legislature has expressly stated when and how in the case of offences under the Customs Enactment this exception to the general principle of criminal law is to apply. An extension of criminal liability such as this must be strictly confined to its express enactment. The principle of 'expressio unius exclusio alterius' applies."

Here then the onus of proof which lay upon the prosecution was neither more nor less than lies upon it in any ordinary criminal matter and the question of whether I am entitled to interfere with the acquittal of any one of the respondents falls to be decided in accordance with the ordinary principles which apply to such matters.

Straightaway I must say that I have been able to discover little, if any, evidence upon which the first respondent could have been convicted of this particular offence. I shall return to this case in a few minutes but as far as this appeal is concerned it must be dismissed as against him.

As regards the other two respondents, there was a very strong case against each of them, and to that case each of them attempted to reply. The evidence

against them on their own behalf was considered by the Magistrate. I see no reason to suppose that he overlooked any important item of evidence on either side. When, however, he came to formulate his final conclusions he made use of certain expressions of which, if I understand him correctly, I cannot approve, and what I have to consider is whether the sum total of what he said amounts to such a misdirection as to justify me in interfering.

Having dealt with the cases against and for the three respondents individually, he went on to refer to the invoice which had come from the alleged "guinea pig" firm in Singapore. He said that invoice had not been proved to be false and

> "I was satisfied that the cloth was purchased by third defendant at $1.85 per yard. In my opinion, when a person is charged for being knowingly concerned in a fraudulent attempt at evasion of customs import duty under section 114(i)(h) and if an invoice was produced by the person at time of applying to import, the prosecution must show that either the invoice is false by discovery and production of another invoice or that the seller is called to say that he sold at a different price and was asked by defendant to put up an invoice stating a lower price."

To my mind, these observations represent an unduly narrow view of the issues that were involved in the case. Clearly, if an invoice was produced by the importer and if there was nothing to show that that invoice was false or fraudulent to the knowledge of the importer then it would go far to demolish any question of fraudulent evasion of customs duty even although the value showed was very different from the value which has to be taken for assessment of customs duty by reason of the provisions of the Enactment. There are, however, many ways in which the effect of such an invoice can be shaken, or indeed destroyed, and it seems to me that in mentioning two of these ways only, that is, production of another invoice or direct evidence of an attempt to procure the execution of a false invoice the Magistrate took an unduly narrow view.

The proper view is that the onus of proof lay all along upon the prosecution. There was never and could never be at any time any question of a technical shifting of the onus of proof and the evidential value to be attached to any invoice or any other piece of evidence was entirely a matter for the consideration of the court of trial in the light of the circumstances of the individual case as a whole.

Had the matter rested there I should have been compelled as against the second and third respondents to allow the appeal and to order a re-trial. It did not, however, end there for the Magistrate went on to say, and this was his concluding observation :—

> "The stories given by the defendants were, I considered, consistent with innocence and might reasonably be true."

If the Magistrate came to that conclusion, it seems to me that although he had to some extent misdirected himself in fact as regards the strength of the prosecution case, he was bound to give the defendants the benefit of that conclusion. For my own part, I am not prepared on the printed evidence alone to say that I am justified in dissenting from that conclusion.

The appeal will therefore be dismissed as against the second and third respondents as well as against the first respondent.

There is one further point, however, which affects the first respondent. The Magistrate has failed to observe that it was open to him while acquitting the first defendant of the offence with which he stood charged under section 114 of the Customs Enactment to convict him of the offence of signing a false declaration in contravention of section 113(i)(a). On the evidence the first respondent was clearly guilty of such an offence and I have no hesitation in doing what the Magistrate should have done and that is convicting him of it. I impose a sentence of one month rigorous imprisonment and a fine of $500/- or another month in lieu of payment.

As to the question of forfeiture I make no order.

Appeal dismissed but first respondent convicted under section 113(i)(a).

SHANTI RUPCHAND BINWANI *alias* SHANTI
v.
UDHARAM DAYARAM BINWANI.

[Orig. Civ. Juris. (Jobling, J.) September 22, 1950]

[Penang — Civil Suit No. 250 of 1949]

Will — Bequest — Vested or contingent — Payment of legacy conditional upon marriage — Whether legatee entitled to payment on becoming sui juris — Assets of the estate in danger — Whether administration order should be made.

The defendant in this suit is executor and trustee of the will of N. G. Binwani deceased and the plaintiff, who is a legatee under the will, claims in the alternative for payment to her of $15,000 and interest under the will or an order for the administration of the estate.

By his will the deceased directed his executor to set aside the sum of $15,000 out of his one-third share in the business of D. R. Binwani & Co. which had branches at Penang, Singapore and Rhio and to invest the amount until the marriage of the plaintiff when it was to be used for her dowry and marriage expenses.

Counsel for the plaintiff contended that the legacy has vested in the plaintiff as it has been separated from the rest of the estate and there is no gift over in the event of failure to realise the condition. He further